

The Evolving Role of the Labor Arbitrator†

MARTIN H. MALIN* & JEANNE M. VONHOF**

I. INTRODUCTION

The typical collective bargaining agreement (CBA) requires just cause for discipline or discharge of employees. The typical CBA also provides a grievance and arbitration procedure as the exclusive method for resolving disputes over the agreement's interpretation and application. A significant portion of discipline and discharge arbitrations involve employees terminated or otherwise disciplined for poor attendance. Typically, an employer will have an attendance control plan that assesses points for each occurrence of poor attendance, such as absence, tardiness, early departure, and failing to call to notify the employer of an absence or tardiness. As successively more points are accumulated, the employee is subject to successively more severe forms of discipline, beginning with a warning and progressing through suspension and discharge.

When a union grieves an employee's discharge under an attendance control plan and the grievance proceeds to arbitration, it is generally accepted that prior discipline imposed on that employee under the plan which was not grieved is not subject to attack in the discharge proceeding. Thus, the focus of the discharge is the employee's record since the prior suspension; efforts to litigate the prior suspension are generally rejected.¹ This is not a rule of law, in the sense that a court will reverse an arbitrator who disregards it, but it is a settled expectation of the parties and, as developed below, the prevailing decision-making ethic of labor arbitrators is to follow the probable expectation of the parties.

Assume, however, that the prior suspension, although not grieved, arose from the assessment of occurrence points for absences that were clearly

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* Professor of Law and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology.

** Arbitrator, member of the National Academy of Arbitrators; Adjunct Professor, Indiana University.

¹ See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 985 (Alan Miles Rubin ed., 6th ed. 2003).

covered by the Family and Medical Leave Act (FMLA).² Assume further that although the time for filing a grievance challenging the prior suspension has long expired, the FMLA limitations period for filing a lawsuit has not.³ How should the arbitrator balance the traditional expectations of the parties with the public law under the FMLA?⁴

In this article, we explore the evolving role of the labor arbitrator with respect to the parties' expectations and public law external to the collective bargaining agreement. Part II sets forth the traditional role of the arbitrator as an instrument of the parties' system of workplace self-government and who, accordingly, is subject to the parties' control and bound by their expectations. Part III chronicles the expansion of public regulation of the workplace that began in the 1960s and the debate among arbitrators that arose commensurate with the expansion of public regulation concerning the impact of such "external law" on the arbitrator as an instrument of the parties. Part IV analyzes more recent developments that may have rendered that debate moot. Part V addresses the potential conflict between the arbitrator's accountability to the parties' expectations and the arbitrator's evolving role as adjudicator of employees' public law claims. We conclude that the parties' expectations are evolving, spurred on by the pervasive influence of the FMLA. We suggest that the potential conflict between arbitral roles is likely to be ameliorated by that evolution.

II. THE TRADITIONAL ROLE OF THE ARBITRATOR AS AN INSTRUMENT OF THE PARTIES

Since the earliest days of the profession, labor arbitrators have been grappling with the problem of how external law should be applied to the resolution of grievances under collective bargaining agreements.⁵ Arbitrators

² 29 U.S.C. §§ 2601–54 (2000).

³ The typical collective bargaining agreement contains a very short period for filing a grievance. The FMLA statute of limitations is two years and is extended to three years for willful violations. *Id.* § 2617(c).

⁴ We previously raised this issue in a brief essay. Jeanne M. Vohnhof & Martin H. Malin, *What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans*, ILL. PUB. EMP. REL. REP., Fall 2004, at 1, 4–5.

⁵ In the first volume of published papers of the National Academy of Arbitrators, Archibald Cox authored a paper entitled, *The Place of Law in Labor Arbitration*, in THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPER FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS, 1948–1954, at 76–89. The paper was written even before the *Steelworkers' Trilogy* was decided, and discussed a conflict that arose frequently immediately after World War II between provisions of the Selective Service Act and seniority provisions of labor agreements.

see their primary role as interpreting and applying the collective bargaining agreement between the parties. The agreement between the parties is their "law." Thus, conflict may arise over whether and how to apply "external laws" to problems that arise under the "law" of the collective bargaining agreement. Questions over the FMLA are only the newest manifestation of this recurring problem.

How do arbitrators resolve this issue? In making a decision regarding any dispute put before the arbitrator, the arbitrator tries to determine and meet the expectations of the parties and to preserve their bargain. While this observation appears obvious, it has significant ramifications with regard to the interplay between arbitration and external law.

The ethic that the parties and their expectations control the arbitration process emerges in the earliest significant writings about labor arbitration. In these writings the arbitrator is seen as an instrument of the parties' system of workplace self-governance. In his groundbreaking article on labor arbitration, Harry Shulman, the first Umpire for the Ford-UAW labor agreement and Dean of Yale Law School, suggested that the underlying premise of American collective bargaining is "that wages and other conditions of employment be left to autonomous determination by employers and labor."⁶ He described and helped define the role of the arbitrator within this autonomous system created by the parties:

A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective bargaining agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.⁷

In the *Steelworkers Trilogy*,⁸ the Court explicitly included this quote from Shulman's article and relied upon his idea of arbitration as part of the parties' system of self-governance. In these landmark decisions, in which the Court defined the legal framework of labor arbitration, the Court described

⁶ Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955).

⁷ *Id.* at 1016.

⁸ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

the collective bargaining agreement as "an effort to erect a system of industrial self-government."⁹ Furthermore, according to the Court, it is because labor arbitration is an integral part of the collective bargaining process that it is due significant deference by the courts. Labor arbitration, the Court noted, is not simply an alternative method of dispute resolution, in the way that commercial arbitration is a substitute for litigation. Instead, the Court stated:

Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of collective disputes is part and parcel of the collective bargaining process itself.¹⁰

The Court noted that federal law explicitly stated that the desirable method for settlement of grievance disputes arising under a collective bargaining agreement is "[f]inal adjustment by a method agreed upon by the parties."¹¹ According to the Court "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under the collective bargaining agreement is given full play."¹²

Arbitration functions as a substitute for industrial strife by providing the parties with a peaceful vehicle to resolve their differences under their CBA. At the time of the *Trilogy*, lawsuits were not a real possibility for unions in most cases, because either there were not laws covering their disputes or the courts did not adequately enforce their agreements. The economic pressure of the strike might be applied even over routine discharges. However, the strike is a blunt and costly tool for both parties as a method of enforcing the agreement. Consequently, the Supreme Court has recognized that in the typical CBA, the arbitration procedure is the quid pro quo for the union's agreement not to strike during the contract's term.¹³ David Feller, whose briefs as a lawyer successfully arguing the *Trilogy* cases were relied upon by the Court and who later became a renowned arbitrator and labor law professor, has theorized that the true essence of a CBA consists of the grievance-arbitration procedure and the no strike clause.¹⁴ Arbitration

⁹ *Warrior & Gulf*, 363 U.S. at 580.

¹⁰ *Id.* at 578.

¹¹ *Am. Mfg.*, 363 U.S. at 566 (quoting 29 U.S.C. § 173(d)).

¹² *Id.*

¹³ *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 248 (1970).

¹⁴ David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

continues to provide a way of resolving the many issues that arise in the workplace without having to “go to the mat” on every issue. The ultimate, risky, and very costly tool of the strike is preserved for the most important issues.

Arbitration enables the parties to avoid workplace strife in a second way. The availability of a grievance-arbitration procedure enables the parties to reach agreement on the terms of the CBA even though they do not agree precisely on what those terms mean. For example, a common CBA provision requires the employer to post vacancies and sets forth a period of time during which employees covered by the CBA may bid to fill the vacancies. The provision further states that where the qualifications of two competing bidders are relatively equal, the job shall go to the more senior of the two. The negotiations leading to such a provision probably began with the union demanding that vacancies be filled strictly by seniority and the employer demanding that they be filled based on qualifications as judged by management. The compromise probably did not resolve the parties’ differences over the interaction between qualifications and seniority. Each party realized that its meaning of “relatively equal” differed greatly from the other’s. However, the availability of the grievance-arbitration procedure allowed the parties to agree on the language knowing that they disagreed on its meaning and postpone refinement of the meaning to case-by-case negotiation through the grievance procedure with the understanding that if, in any given case, they were unable to agree, the language would mean in that case whatever the arbitrator would say it meant.

The availability of the grievance-arbitration procedure also enables the parties to reach agreement on general terms of a CBA where further refinement would be impracticable. Consider, for example, the typical CBA provision requiring just cause for discipline and discharge. It would be impracticable, perhaps even impossible, for the parties in negotiating the contract, to draft a precise disciplinary code, specifying what acts of misfeasance, malfeasance and nonfeasance would be subject to what penalties. Instead, they agree on a general just cause provision and defer refinement of its meaning to case-by-case negotiation through the grievance procedure with the understanding that if they are unable to agree on the meaning in any particular case, they will be bound by the arbitrator’s interpretation.

Giving “full play” to the parties’ own system of resolving their differences led the Supreme Court in the *Trilogy* to conclude that courts generally should not interfere with arbitration, either to decide that certain matters are inarbitrable before arbitration begins or to review the merits of an award after arbitration. With regard to the ability of the courts to determine whether a subject is arbitrable, the Court held that courts should not deny an

order to arbitrate a particular grievance “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”¹⁵

The Court elaborated on how limited the role of the courts is even in making this determination of arbitrability. A court is confined to

ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator’s judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business . . . considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.¹⁶

Furthermore, the notion that arbitration is part of the parties’ system of workplace self-governance underlies the Court’s decision to strictly limit judicial review of labor arbitration awards. In *Paperworkers v. Misco*,¹⁷ the Court reiterated its holding from the *Trilogy* that as long as an award “draws its essence from the collective bargaining agreement,”¹⁸

the courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. “The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards.”¹⁹

The Court’s view that deference is due to arbitration awards is colored by

¹⁵ *Warrior & Gulf*, 363 U.S. at 582–83.

¹⁶ *Am. Mfg.*, 363 U.S. at 568.

¹⁷ *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

¹⁸ *Id.* at 36 (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

¹⁹ *Id.* (quoting *Enterprise Wheel*, 363 U.S. at 596).

the view that arbitrators are “indispensable agencies in a *continuous* collective bargaining process.”²⁰ According to the Court, the collective bargaining agreement “is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman [of the written collective bargaining agreement] cannot wholly anticipate.”²¹ The arbitrator is called upon to help resolve those disputes that the parties did not wholly anticipate—or for other reasons have decided to resolve through arbitration. Again, the Court contrasts the labor agreement with a commercial contract:

Courts and arbitration in the context of most commercial contracts are resorted to . . . [as] the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.²²

Thus, according to the Court, “the labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”²³ The parties have bargained for the arbitrator to “bring his informed judgment to bear in order to reach a fair solution of a problem.”²⁴ This is especially true where “the need is for flexibility in meeting a wide variety of situations,” such as in formulating remedies.²⁵ Thus, as David Feller has written:

The collective bargaining agreement is not a contract insofar as it establishes the rights of employers and employees, but is, rather, a set of rules governing their relationship—rules which are integral with and cannot be separated from the machinery that the parties have established to resolve disputes as to their meaning.²⁶

²⁰ *Enterprise Wheel*, 363 U.S. at 596 (emphasis added).

²¹ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

²² *Id.* at 581.

²³ *Id.*

²⁴ *Enterprise Wheel*, 363 U.S. at 597.

²⁵ *Id.*

²⁶ David Feller, *The Coming End of Arbitration's Golden Age*, in ARBITRATION 1976, PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF

Broad judicial deference to labor arbitrator rulings occurs in an environment which has a high degree of self-policing. The union and employer jointly select the arbitrator. Both the union and the employer are likely repeat players in the arbitration system. Consequently, each balances the other, ensuring that the arbitrator selected is not likely to be biased toward either party. If either party perceives an arbitrator as favoring the other party, it will strike that arbitrator from consideration for future appointments. Consequently, labor arbitrators realize that any attempt to curry favor with one party will short circuit their careers.²⁷ Experienced arbitrators recognize that the only route to long term success, known in the practice as "acceptability," is to decide cases on their merits, fairly, impartially and professionally. For example, Arnold Zack, a highly respected arbitrator, has advised, "[A]n arbitrator should decide every case as if it is his last one If an arbitrator is concerned with the parties' reactions to his rulings, he will not survive. An arbitrator must adhere to his own reasoning and judgment and establish his reputation on that."²⁸

The broad authority of arbitrators as established by the Supreme Court is not without limits. Under the *Trilogy*, it is not the law, however, but rather the parties to the collective bargaining agreement, who determine those limits. Thus, according to the Court, the arbitrator, "does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."²⁹

The self-policing nature of party selection of the arbitrator ensures that the arbitrator will decide the case in accordance with the parties' expectations. Arbitrators who fail to decide cases in accordance with the mutual expectations of the parties are not likely to work again. Thus, it is the expectations of the parties that is the primary constraint on labor arbitrators.³⁰

Thus, the Supreme Court, in creating the legal framework for arbitration,

ARBITRATORS 97, 101 (Barbara D. Dennis & Gerald G. Somers eds., 1976). Feller also argued in this paper that it is the recognition that arbitration is "part of a system of industrial self-governance" and not the special competence of arbitrators that prompts deference from the courts.

²⁷ See generally Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 905 (1979).

²⁸ Arnold Zack, *Decision-Making*, in LABOR ARBITRATOR DEVELOPMENT: A HANDBOOK 113 (Christopher A. Barreca et al. eds., 1983).

²⁹ *Enterprise Wheel*, 363 U.S. at 597.

³⁰ See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy* to Gilmer, 44 HASTINGS L.J. 1187, 1198-99 (1993).

did so as a result of its view that arbitration is an integral part of the autonomous system of self-government represented by the collective bargaining process. The importance of the *Trilogy* and its reasoning cannot be overstated. Had it not been for the deference toward arbitration established by the Court at that crucial juncture, it is unlikely that labor arbitration would have assumed the role that it enjoys today.

III. THE EXPANSION OF PUBLIC REGULATION OF THE WORKPLACE IN THE 1960'S AND AFTER AND THE MELTZER-HOWLETT DEBATE

The Supreme Court decided the *Trilogy* at a time when there were few other laws directly affecting employees' rights. In a provocative paper, David Feller referred to this era as "Arbitration's Golden Age," in which, essentially, "the sole source of law in industries in which the grievance and arbitration machinery was well-established was the collective agreement."³¹

According to Feller, even the effect of the National Labor Relations Act was primarily procedural, i.e. designed to protect the process by which the parties' system of self-governance was created.³² Other laws that created substantive rights, like the guarantee for overtime pay, were not that important, he argued, because they set only minimum standards.³³

This situation changed during the 1960's, when Congress enacted a number of laws creating substantive rights for employees: the Equal Pay Act,³⁴ Title VII of the Civil Rights Act of 1964,³⁵ the Occupational Safety and Health Act,³⁶ and ERISA.³⁷ Feller argued that the passage of these laws marked the end of the "Golden Age," because the introduction of public law as a source of employee rights, and the availability of other bodies to enforce them

necessarily undermine the unitary—or almost unitary—system of governance under the agreement of which the institution of arbitration and its special status are the products. Arbitration is not an independent

³¹ Feller, *supra* note 26, at 108.

³² *Id.*

³³ *Id.*

³⁴ 29 U.S.C. § 206(d) (2000).

³⁵ 42 U.S.C. §§ 2000e to 2000e-17 (2000).

³⁶ 29 U.S.C. §§ 651–78 (2000).

³⁷ 29 U.S.C. §§ 1001–1461 (2000). To that list we can now add the employment provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000), as well as the Family and Medical Leave Act, 29 U.S.C. §§ 2601–54 (2000). In addition, the number of state laws affecting the employment relationship in these areas also has increased since the 1960's.

force . . . and to the extent that the collective agreement is diminished as a source of employee rights, arbitration is equally diminished.³⁸

One need not accept Feller's position about the ultimate effect of these laws on arbitration to agree that because of these laws, external law is potentially implicated in many more grievances than during "the Golden Age." Their increasing contact with external law led to a recurring debate among labor arbitrators about how to handle these problems.

The debate is often referred to as the "Meltzer-Howlett debate," after a famous exchange between Professor Bernard Meltzer and arbitrator Robert Howlett at the twentieth annual meeting of the National Academy of Arbitrators. Meltzer acknowledged that where an arbitrator faces two interpretations of a collective bargaining agreement, one of which is repugnant to a statute, "the statute is a relevant factor for interpretation."³⁹ However, he continued, "Where . . . there is an irrepressible conflict, the arbitrator, in my opinion, should respect the agreement and ignore the law."⁴⁰

Meltzer reasoned that arbitrators could not be credited "with any competence, let alone any special expertise, with respect to the law, as distinguished from the agreement."⁴¹ Arbitrators deciding cases on the law instead of the contract, in Meltzer's view, "would be deciding issues that go beyond not only the submission agreement but also arbitral competence. Arbitrators would, moreover, be doing so within a procedural framework different from that applicable to official tribunals. Finally, they would be impinging on an area in which courts or other official tribunals are granted plenary authority."⁴²

In a subsequent article, Meltzer explained that his contention that arbitrators lack competence to resolve statutory claims referred to arbitrators' institutional competence rather than individual arbitrators' personal abilities.⁴³ The problem of institutional competence arose from the underlying purpose of arbitration. It is a vehicle for resolving disputes under the CBA and the arbitrator's presumed expertise and the parties' consent to be bound by the arbitrator's judgment were limited to the CBA. In addition,

³⁸ Feller, *supra* note 26, at 109.

³⁹ Bernard D. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, in THE ARBITRATOR, THE NLRB AND THE COURTS, PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 15 (Dallas L. Jones ed., 1967) [hereinafter NAA 20TH MTG PROC.] (reprinted at 34 U. CHI. L. REV. 545 (1967)).

⁴⁰ *Id.* at 16.

⁴¹ *Id.*

⁴² *Id.* at 17 (footnotes omitted).

⁴³ Bernard D. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 34 (1971).

many arbitrators lacked legal training.⁴⁴

Howlett, on the other hand, argued that “arbitrators *should* render decisions on the issues before them *based on both contract language and law*.”⁴⁵ He maintained that the law is incorporated into every agreement,⁴⁶ and that “[t]he law is part of the ‘essence [of the] collective bargaining agreement’ to which Mr. Justice Douglas has referred.”⁴⁷

Howlett also considered arbitrators obligated to probe for statutory issues, even those that the parties have not raised. In Howlett’s view, when an arbitrator’s probing uncovers issues that are better resolved by external legal authority, the arbitrator should so advise the parties and withdraw from the case.⁴⁸

Meltzer and Howlett represent the two poles of the debate over when and how to apply external law, especially when there is a clear conflict between the law and the contract. Arbitrator Richard Mittenenthal took a position between Meltzer’s and Howlett’s, the year after their debate, arguing that “although the arbitrator’s award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract.”⁴⁹

The Supreme Court appeared to endorse Meltzer’s position in *Alexander v. Gardner-Denver Co.*⁵⁰ Gardner-Denver discharged Alexander, who grieved and lost in arbitration. Alexander also sued under Title VII. The Court of Appeals for the Tenth Circuit held that Alexander’s unsuccessful grievance arbitration precluded his Title VII litigation. The Supreme Court reversed, holding that the grievance arbitration and the Title VII litigation were independent of each other. The Court relied on Meltzer’s writings concerning the arbitrator’s lack of institutional competence to resolve public law claims.⁵¹ However, in a subsequent decision, the Court suggested that an arbitrator has authority under the contract doctrine of impossibility of

⁴⁴ *Id.*

⁴⁵ Robert G. Howlett, *The Arbitrator the NLRB and the Courts*, in NAA 20TH MTG PROC., *supra* note 39, at 67, 83 (emphasis in original).

⁴⁶ *Id.* at 85 (citation omitted).

⁴⁷ *Id.* at 83. Howlett did express one caveat to his position. Where the parties advise the arbitrator that they are reserving statutory questions for presentation to an external forum, the arbitrator should avoid the statutory issues or withdraw from the case. *Id.* at 87.

⁴⁸ *Id.* at 92–93.

⁴⁹ Richard Mittenenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE 21ST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 42, 50 (Charles M. Rehmus ed., 1968).

⁵⁰ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

⁵¹ *Id.* at 52–53 & n.16.

performance to refuse to enforce a CBA provision that conflicts with external law.⁵²

The debate continues, as arbitrators have continued to refine their thinking about whether and how to apply an increasing list of laws in the great variety of situations in which they arise. Where the contract language specifically incorporates a law, or the parties explicitly agree to the arbitrator interpreting the law as part of the grievance, few arbitrators would reject this assignment or conclude that they do not have the authority to do so. That authority comes from the parties themselves. Nor would most arbitrators proceed to interpret and apply a law when the labor agreement—or the parties at the arbitration hearing—specifically prohibit such action. In both of these cases the arbitrator has a clear path to follow to meet the expectations of the parties. The vexing cases, of course, are those in which the parties' expectations are not so clear. What should the arbitrator do if one party argues that the law applies and the other does not agree? What if, as is often the case now with the FMLA, the language of the written agreement incorporates some of the language of the statute? Should an arbitrator apply only those sections from the statute that are referenced in the agreement? Should the arbitrator apply the general principles underlying a law, such as Title VII or the ADA, without applying all the precise requirements for a finding of discrimination developed by the courts? What should the arbitrator do if he or she believes that an application of the law may result in a different disposition of the case than if it is not considered, and neither side raises the issue?⁵³

Theodore St. Antoine, another past president of the National Academy of Arbitrators, has described the role of the arbitrator as that of the "contract reader." He uses this phrase to express the view that the parties in arbitration have bargained for the interpretation of their contract provided by the arbitrator—including the arbitrator's interpretation of external law—and the courts should not disturb that interpretation.⁵⁴ According to St. Antoine, "the

⁵² W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 767 n.10 (1983).

⁵³ For a critique of the arbitration system as it has developed, see James A. Gross, *Incorporating Human Rights Principles into U.S. Labor Arbitration: A Proposal for Fundamental Change*, 8 EMP. RTS. & EMP. POL'Y J. 1 (2004). The author criticizes those who lament the passing of an age when external laws protecting employees' rights did not affect arbitration significantly. He argues that arbitrators should go even beyond the law and rely upon fundamental human rights principles in deciding workplace disputes. He applies this analysis to a study of arbitration cases involving employees who have refused to work for safety reasons.

⁵⁴ Theodore St. Antoine, Presidential Address, *Contract Reading Revisited*, in ARBITRATION 2000, WORKPLACE JUSTICE AND EFFICIENCY IN THE 21ST CENTURY, PROCEEDINGS OF THE 53RD ANNUAL MEETING OF THE NATIONAL ACADEMY OF

arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract."⁵⁵ Thus, under St. Antoine's view, the arbitrator's interpretation—even of external law—becomes part of their contract. It is especially important then for the arbitrator to try to determine the parties' expectations with regard to that external law when the contract language itself is not clear.

How does the arbitrator discern the parties' expectations with regard to external law when the contract itself is not clear about it? In a 1989 address to the National Academy of Arbitrators, Richard Miententhal and Richard Bloch discussed the role of the "implications" of an agreement, principles that the arbitrator may infer when the contract itself is silent:

Implications arise from existing but unstated realities of the world in which the contracting parties live and the circumstances that surround the making of their bargain. These realities, these "facts of life," have little or nothing to do with what is actually said at the bargaining table. It is this world of implications that puts arbitrators to the sternest test.⁵⁶

The test is stern because the arbitrator may not simply impose his own brand of industrial justice. The purpose for giving credit to such implications is to meet the arbitrator's "overriding concern . . . to *preserve the parties' bargain*, not to change it."⁵⁷ The authors suggested situations in which arbitrators commonly infer such implications that are not found in the collective bargaining agreement, e.g. in the "work now, grieve later" doctrine; the principle that an employer does not have an unlimited right to contract out work, even in the absence of any contract language over subcontracting; and in the position that interest should not be awarded on backpay awards.

In a nod to St. Antoine's use of the term "contract reader," the authors suggested that when the arbitrator considers these implications, he or she becomes "the bargain reader."⁵⁸ As a general rule, the authors concluded that

ARBITRATORS 1, 1–2 (Steven Briggs & Jay E. Grenig eds., 2001) [hereinafter NAA 53RD PROC.].

⁵⁵ Theodore St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

⁵⁶ Richard Miententhal & Richard Bloch, *Arbitral Implications: Hearing the Sounds of Silence*, in ARBITRATION 1989, THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING, PROCEEDINGS OF THE 42ND ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 65, 66 (Gladys W. Gruenberg ed., 1990) [hereinafter NAA 42ND PROC.].

⁵⁷ *Id.* at 67 (emphasis in original).

⁵⁸ *Id.* at 81–82.

arbitrators should “reject external law implications” because “[b]y doing so they preserve the parties’ bargain.”⁵⁹

The prevailing view, particularly in the private sector, is that laws are not part of the contract and that arbitration is not a forum for enforcing statutory rights The implication that applicable law is incorporated in the contract would be warranted where there is a real or tacit understanding to that effect It is doubtful that there is any general understanding among employers and unions on this matter. Negotiators are concerned with wages, hours, working conditions, and fringe benefits. They seldom traffic in such abstract notions as the role of law under the contract.⁶⁰

Richard Bloch returned to this issue eleven years later in his 2000 address to the National Academy on just cause.⁶¹ He noted that “[t]imes are changing” and that “[a]rbitrators will, in fact, have to deal with prospects of incorporated statutory references, because they are surely relevant” and that “[c]ontracts should not be interpreted in a manner that is clearly contrary to a statutory mandate.”⁶² But he emphasized that “this whole exercise remains private,”⁶³ and that the just cause clause of the agreement still predominates in discipline cases. In his view, application of an external law is just one aspect in the consideration of just cause. Bloch contended that when the parties “incorporate [a law] by reference” the arbitrator should not “infer that the parties sat down and decided to swallow, wholesale, each section and each implementing regulation.” According to the author, “absent clear guidance from the parties, the assumption by the arbitrator must be that these statutes have been incorporated, if at all, for the purpose of absorbing their generalized benevolent goals, and not necessarily for their specifics in every detail.”⁶⁴

The question posed by this article is whether this view of external law and arbitration is changing. What are the parties’ expectations? What is the bargain that the arbitrator should preserve with regard to the application of external law in 2005, particularly with regard to the FMLA? Should the arbitrator assume that the parties intended to incorporate, if at all, only the general purpose of the FMLA or its specifics as well? Do the parties expect the arbitrator to render an award in which the result complies with the

⁵⁹ *Id.* at 78.

⁶⁰ *Id.* at 67.

⁶¹ Richard I. Bloch, *The Changing Face of Just Cause: One Standard or Many?*, in NAA 53RD PROC., *supra* note 54, at 20.

⁶² *Id.* at 33.

⁶³ *Id.*

⁶⁴ *Id.* at 37.

FMLA? Do they expect the arbitrator to know and apply not just the law but the implementing regulations to the FMLA? Is the arbitration process to remain essentially private if it becomes even more entwined with external law? We survey developments that significantly impact these questions in the next Part.

IV. THRUSTING PUBLIC LAW ONTO LABOR ARBITRATORS: HAS THE MELTZER-HOWLETT DEBATE BEEN RENDERED MOOT?

Many developments since the original debate between Professor Meltzer and Arbitrator Howlett and since the Court's decision in *Gardner-Denver* seemingly have overtaken the debate. One of these developments is internal—parties have expressly incorporated the public law into their contracts. It is very common for parties to include a non-discrimination clause in their CBAs and it is common for such non-discrimination clauses to expressly refer to public law.⁶⁵ It is increasingly common for parties to expressly refer to the FMLA in the CBA.⁶⁶ In the public sector, parties often expressly incorporate relevant statutes and regulations into the CBAs.

Most of the developments overtaking the Meltzer-Howlett debate are external, however. In the public sector, these include the requirement that arbitrators of disputes involving agencies of the federal government apply the law with exactitude. Some state courts are developing expansive views of the scope of public policy review of arbitration awards. The most far-reaching developments are those that follow in the wake of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁶⁷ Not surprisingly, courts are taking a much broader view of a labor arbitrator's authority to interpret and apply public law. We explore each of these developments below.

A. Developments in the Federal Sector

The basic function of the grievance and arbitration process in the private sector is to assure compliance with the collective bargaining agreement. Arbitration between unions and agencies of the federal government also serves this purpose. A "second and also very important function" of the process in the federal sector is to "review and police compliance by federal agency employers and employees alike with controlling laws, rules and

⁶⁵ See ELKOURI & ELKOURI, *supra* note 1, at 516.

⁶⁶ See Vohnhof & Malin, *supra* note 4, at 3.

⁶⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

regulations.”⁶⁸ The Federal Service Labor Management Relations Statute (FSLMS) requires every collective bargaining agreement in the federal sector to include a grievance procedure. In addition, the law requires that collective bargaining agreements provide for binding arbitration for any grievances not resolved under the negotiated grievance procedure. The law also provides broad definitions for “grievances” and for what grievances “shall” be subject to the grievance and arbitration procedures.⁶⁹

While many subjects are thus required by law to be arbitrated in the federal sector, the FSLMS also places substantial limits on the process. Collective bargaining is prohibited—or in some cases only permitted—on certain matters that would be mandatory subjects of bargaining in the private sector. Bargaining is prohibited on certain subjects that are considered by law to be within the exclusive decision-making authority of management.⁷⁰

⁶⁸ ELKOURI & ELKOURI, *supra* note 1, at 1282.

⁶⁹ 5 U.S.C. § 7121 (2000).

⁷⁰ Thus 5 U.S.C. § 7106(a) states that the authority granted federal employees to engage in collective bargaining over the conditions of employment shall not affect the authority of any management official of any agency:

- (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
- (2) in accordance with applicable laws—
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
 - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
 - (C) with respect to filling positions, to make selections for appointments from—
 - (i) among properly ranked and certified candidates for promotion; or
 - (ii) any other appropriate source; and
 - (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

The words “in accordance with applicable laws” have been successfully employed to challenge certain management actions. *EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984) (holding that in making “contracting-out” decision, agency did not follow circular issued by the Office of Management and Budget (OMB)). The clause appears to be properly enforceable through the grievance and arbitration processes. ELKOURI & ELKOURI, *supra* note 1, at 1286. In addition, management may be required to engage in “implementation bargaining,” i.e. bargaining over procedures to be observed by management in exercising its rights and “impact bargaining,” i.e. bargaining over the effect on employees of exercising management rights. 5 U.S.C. § 7106(b)(2)–(3) (2000). Furthermore, while deference is given in the law to “[g]overnment-wide rule[s] or regulation[s],” over which bargaining is not required, the same deference does not apply to “lower level” rules and regulations. Generally a collective bargaining agreement will control over a lower level

Arbitration awards and decisions of the Federal Labor Relations Authority (FLRA) recognize that certain federal sector management rights cannot be bargained away. Negotiated contract language that is inconsistent with the rights reserved to management by law is not enforceable.⁷¹

Therefore, a grievance may not be sustained in the federal sector if the grievance is based upon a contract provision addressing a subject that the statute excludes from bargaining, or a provision that infringes on a right reserved to management by law. In addition, a grievance may not be sustained if it infringes on other federal laws, rules, or regulations.

Most arbitration awards in the federal sector are reviewable by the FLRA, upon the timely request of either party. Those that are not reviewable by the FLRA may be reviewable by the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), or the federal courts.⁷² By law, the FLRA may conclude that an arbitration award is "deficient" on grounds "similar to those applied by Federal courts in private sector labor-management relations."⁷³ However, in addition to the regular private-sector grounds for review, the FSLMS specifically gives the FLRA the authority to find an arbitration award deficient because it is "contrary to any law, rule, or regulation."⁷⁴ The law also gives the FLRA the authority to "take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or

regulation. However, conflict arises over "intermediate level" regulations, those issued, for example, by the top level or head of an agency or a primary national subdivision of the agency. See ELKOURI & ELKOURI, *supra* note 1, at 1292-95. Even government-wide regulations may not apply if the collective bargaining agreement precedes the government regulation. 5 U.S.C. §7116(a)(7).

⁷¹ See, e.g., Veterans Adm. Med. Ctr. & Am. Fed'n Gov't Employees Local 2028, 25 F.L.R.A. 520 (1987); 438 Air Base Group & Am. Fed'n Gov't Employees Local 1778, 22 F.L.R.A. 12 (1986); Defense Contract Adm. & Nat'l Ass'n Gov't Employees Local R2-65, 20 F.L.R.A. 783 (1985); Am. Fed'n Gov't Employees Local 1712 & U.S. Army, 172nd Infantry Brigade, 6 F.L.R.A. 466 (1981).

⁷² ELKOURI & ELKOURI, *supra* note 1, at 1295. For a useful chart of which kinds of disputes may be taken to which forum, and reviewed by which forum, see *id.* at 1280.

⁷³ 5 U.S.C. § 7122(a)(2). Employing these standards, the FLRA has concluded that an arbitration award is "deficient" because the arbitrator exceeded his or her authority, the award does not draw its essence from the collective bargaining agreement, the award is based on a gross error of fact or a "nonfact," the hearing was not conducted fairly, the award is contrary to public policy, the award is incomplete, ambiguous, or contradictory, making its implementation impossible, the arbitrator was biased or partial, or the award was procured by corruption, fraud or undue means. See cases cited in ELKOURI & ELKOURI, *supra* note 1, at 1298-99.

⁷⁴ 5 U.S.C. § 7122(a)(1).

regulations.”⁷⁵ The FLRA has exercised this authority to overturn or modify arbitration awards.

Furthermore, the FLRA exercises substantial authority in determining whether an arbitration award is deficient because it violates the law. The FLRA conducts a *de novo* review of whether an arbitration award violates a law, examining whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. Generally, the FLRA defers to the arbitrator with regard to factual findings.

There appears to be no hard data on what percentage of federal arbitration awards are submitted to the FLRA or to other bodies for review. There is, however, a strong perception that arbitration awards in the federal sector are reviewed and overturned more frequently than in other sectors.⁷⁶ In part, no doubt this is because of the explicit statutory right provided to the parties in the federal sector to file exceptions to arbitration awards. A higher rate of review probably also results, however, from the inextricable intertwining of law with the arbitration process in the federal sector—and particularly with the authority given to the FLRA to find as “deficient” an arbitration award that conflicts with “any law, rule or regulation.”

Furthermore, given the primary role of law in federal sector arbitration, various commentators have called for arbitrators to refrain from rendering awards that conflict with laws, rules, or regulations. The FLRA has the authority to overturn or modify such awards without any regard to whether the parties have raised and discussed these items in arbitration. The chair of the Federal Labor Relations Authority has told arbitrators that they need to “look beyond the contract. They need to apply the proper laws. It’s in their interest and in the interest of the parties.”⁷⁷ She has also told arbitrators that they have the responsibility to ensure that their awards comply with federal statutes and regulations and has suggested that arbitrators may have to do

⁷⁵ 5 U.S.C. § 7122(a).

⁷⁶ See James Harkless, *FLRA Review of Arbitration Awards*, in NAA 42ND PROC., *supra* note 56, at 229, 229–30. While former Academy President Harkless concluded that the parties filed exceptions over only a small portion of arbitration awards in the federal sector, he found that the FLRA modified or set aside about 18% of the arbitration awards on exceptions filed between January 1979 and January 1988. He found particularly disturbing that the FLRA sustained less than 50 percent of the arbitration awards involving agency-filed exceptions.

⁷⁷ Jean McKee, *Federal Sector Arbitration*, in ARBITRATION 1991, THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, PROCEEDINGS OF THE 44TH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 187, 190 (Gladys W. Gruenberg ed., 1992).

research independent of the parties.⁷⁸ Arbitrators who work in the federal sector also have urged other arbitrators to become more familiar with applicable legal precedents in the federal sector. Former President of the National Academy of Arbitrators, James Harkless, urged Academy members in 1989 to “be sure in each case that any applicable statutes, rules, or regulations are carefully considered” in order to reduce the rate of FLRA reversals or modifications of arbitration awards, and to avoid “call[ing] into question the competence of arbitrators to resolve successfully labor-management disputes in which some law, rule, or regulation may have an effect.”⁷⁹ While the sheer volume of laws, rules, or regulations applicable to a federal sector arbitration might appear overwhelming, one federal agency commentator suggested (in 1989 at least) that federal sector arbitrators need to pay attention to four primary laws or regulations: 1) non-waivable management rights as contained in 5 U.S.C. § 7106(a); 2) harmful-errors standard for review of disciplinary actions in 5 U.S.C. § 7701; 3) the Back Pay Act; and 4) the rules regarding attorneys’ fees.⁸⁰

Thus, arbitrators hearing cases between federal agencies and the unions that represent their employees are expected to apply public law and are expected to ensure that their awards do not contravene public law. In essence, the Meltzer-Howlett debate simply does not apply in the federal sector.

B. The State and Local Government Public Sector

State law governs labor relations and collective bargaining among state and local government employees, and the approaches vary widely from state to state.⁸¹ The approach to labor arbitration also varies considerably among

⁷⁸ See Jean McKee, *The Arbitration of Statutory Disputes: The Authority Perspective*, in ARBITRATION 1992, IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE 45TH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 143 (Gladys W. Gruenberg ed., 1993).

⁷⁹ Harkless, *supra* note 76, at 235. He also suggested that many awards were overturned simply because arbitrators did not make proper findings necessary to comply with the federal Back Pay Act. He identified the findings that the arbitrator must make as follows: 1) that an agency action was unjustified or unwarranted; 2) that this resulted in the withdrawal or reduction of all or part of the grievant’s pay or allowances, and that “but for” the agency’s unwarranted actions, the grievant otherwise would not have suffered such withdrawal or reduction in pay.

⁸⁰ William R. Kansier, *Arbitration in the Federal Sector, A Panel Discussion*, in NAA 42ND PROC., *supra* note 56, at 206.

⁸¹ See generally JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 81–91 (2004).

the states.⁸² Developments in some of the states have thrust arbitrators into interpreting and applying the public law.

In *American Federation of State, County and Municipal Employees v. Department of Central Management Services*,⁸³ the Illinois Department of Children and Family Services discharged a caseworker who had reported that three minor children assigned to her were doing fine when, in fact, the children had died in a fire a month earlier. The union grieved the discharge and an arbitrator ruled that the discharge violated the collective bargaining agreement's requirement that discipline be imposed in a timely manner. The arbitrator ordered that the caseworker be reinstated and made whole for her losses.

The Illinois Supreme Court held that the arbitration award was unenforceable because it contravened public policy. In so holding, the court faulted the arbitrator for failing to consider the public policy ramifications of the remedy that he awarded:

The arbitrator's remedy for the violation of the contract's time provision caused him to fully reinstate a DCFS child welfare specialist—charged with both falsifying a uniform progress report intended for submission to the Juvenile Court and neglecting to compile required family service plans for three years—without any determination that the welfare of the minors in the DCFS system will not be compromised by such a reinstatement. Rather, he avoided discussion of the charges against DuBose. He did not take any precautionary steps to ensure the misconduct at issue here will not be repeated, and he neither considered nor respected the pertinent public policy concerns that arose from them. Thus, the remedy in this case violates public policy in that it totally ignores any legitimate public policy concerns.⁸⁴

The court's admonition to arbitrators to consider the public policy aspects of grievances coming before them has not been lost on the parties or the arbitrators. Although a court in Illinois will enforce an arbitration award that implicitly made findings that a remedy was consistent with public policy,⁸⁵ it has become common practice for arbitrators to make specific public policy findings, particularly when sustaining grievances of employees charged with serious misconduct.⁸⁶

⁸² See *id.* at 371–404.

⁸³ *Am. Fed'n of State, County & Mun. Employees v. Dep't of Cent. Mgmt. Serv.*, 671 N.E.2d 668 (Ill. 1996).

⁸⁴ *Id.* at 678.

⁸⁵ See *State v. AFSCME Council 31*, 749 N.E.2d 472, 476–77 (Ill. App. Ct. 2001).

⁸⁶ See Edwin H. Benn & Jeanne M. Vohnhof, *The Public Policy Exception in Illinois*, THE CHRONICLE, Fall 2005, at 23 (reporting on the comments of Arbitrator Edwin Benn

In *Knipp v. Lawrence County Board of Commissioners*,⁸⁷ the director of the Lawrence County Department of Job and Family Services informed Knipp, a social worker employed by the department, that her employment was terminated. The director did not obtain approval of the termination from the county Board of Commissioners. Knipp sued, alleging that the department failed to follow procedures mandated by Ohio statute for terminating an employee. The Ohio Court of Appeals held, however, that Knipp was required to grieve and arbitrate her claim that her purported termination contravened state statute. The arbitrator hearing such grievance would be thrust into the role of interpreting and applying public law rather than the parties' collective bargaining agreement.

Developments in the public sector might be dismissed as quirks of individual states. However, as developed in the next section, these developments are consistent with a developing pattern in the private sector that is causing arbitrators to increasingly resolve employees' public law claims in the course of collectively bargained grievance-arbitration.

C. The Fallout from Gilmer

As union density declined, employment litigation and the cost thereof increased. A number of employers, particularly in the securities industry, began requiring employees, as a condition of employment, to agree to arbitrate any claim arising out of their employment, including claims based on federal statutes. All circuits that considered the issue except for the Fourth Circuit relied on *Gardner-Denver* and its progeny to hold such pre-dispute agreements to arbitrate statutory employment claims unenforceable.⁸⁸ In *Gilmer v. Interstate/Johnson Lane Corp.*,⁸⁹ the Supreme Court sided with the outlier Fourth Circuit and held that an agreement contained in a securities

at the National Academy of Arbitrators Annual Meeting, May 27, 2005).

⁸⁷ *Knipp v. Lawrence County Bd. of Comm'rs*, 2005-Ohio-3103 (Ohio Ct. App. 2005); see also *Kostecki v. Dominick's Finer Foods, Inc.*, 836 N.E.2d 837 (Ill. App. Ct. 2005) (requiring employee to arbitrate under CBA claims for violations of state wage payment and overtime statutes).

⁸⁸ See *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), vacated by 500 U.S. 930 (1991); *Utey v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 591 (7th Cir. 1986). The sole authority holding a pre-dispute agreement to arbitrate a statutory employment claim enforceable was the Fourth Circuit's opinion in *Gilmer*. See *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

⁸⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

exchange's registration obligating the employee to arbitrate all claims against his employer was enforceable with respect to the employee's claim under the Age Discrimination in Employment Act.

Gilmer did not expressly overrule *Gardner-Denver*. *Gilmer* distinguished *Gardner-Denver* as a case arising under a collective bargaining agreement where the arbitrator's authority was limited to interpreting and applying the CBA and did not extend to resolving statutory claims.⁹⁰ A major tenet of *Gardner-Denver*'s reasoning, however, was the Court's view that the arbitral forum was poorly suited for resolving statutory claims. This aspect of the Court's reasoning expressly relied on Meltzer's writings concerning the arbitrator's lack of institutional competence to adjudicate statutory claims. The *Gilmer* Court flatly rejected that portion of the rationale:

The Court in . . . *Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."⁹¹

Not surprisingly, encouraged by the affirmance in *Gilmer*, the Fourth Circuit continued its pattern in arbitration cases and held that employees covered by CBAs were required to pursue their statutory claims through the CBA's grievance and arbitration procedure.⁹² The Fourth Circuit was again an outlier, as all other circuits that addressed the issue held that *Gardner-Denver* continued to control.⁹³ In *Wright v. Universal Maritime Service Corp.*,⁹⁴ the Court declined to resolve the issue of whether an employee can be compelled to arbitrate a statutory claim under the provisions of a CBA. The Court held, however, that if such an agreement waiving the judicial

⁹⁰ *Id.* at 34.

⁹¹ *Id.* at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

⁹² See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

⁹³ See *Penny v. United Parcel Serv.*, 128 F.3d 408, 412 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363-65 (7th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525-26 (11th Cir. 1997); *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995).

⁹⁴ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

forum is to be enforced, the agreement must be clear and unmistakable.⁹⁵ In so doing, the Court recognized the tension between *Gilmer* and *Gardner-Denver*,⁹⁶ but declined to resolve it definitively.

The *Wright* Court made clear that where a public law claim is arbitrated under a CBA, “the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires.”⁹⁷ Thus, to the extent that *Wright* or other fallout from *Gilmer* compels arbitration under a CBA of a public law claim, arbitrators have an obligation to apply the relevant public law. Arbitrators may also be thrust into applying public law where parties choose to arbitrate public law claims because the fallout from *Gilmer* may mean that the arbitration proceeding will be the only forum in which those claims will be adjudicated.

1. Compelling Arbitration of Public Law Claims Under a CBA.

Gardner-Denver offered three reasons for its holding that an employee may pursue a Title VII claim in court despite losing a grievance arbitration arising out of the same set of facts: 1) Arbitration is inferior to adjudication for resolving public law claims; 2) Grievance arbitration is intended to resolve claims of breach of the CBA rather than claims arising under public law independent of the CBA; and 3) The union, rather than the individual employee, controls the grievance arbitration process.⁹⁸

The first rationale has been completely undermined by *Gilmer*. The second rationale led the *Wright* Court to require a clear and unmistakable waiver of the judicial forum before compelling arbitration of a statutory claim pursuant to a CBA. Whether the third concern should preclude waiver of the judicial forum in a CBA was the issue left open in *Wright*.

Most courts considering defense requests to compel plaintiffs to arbitrate their statutory claims under their CBA have applied *Wright* and found no clear and unmistakable waiver of the right to litigate.⁹⁹ A significant minority, however, have found the requisite waivers.

Not surprisingly, the Fourth Circuit has led the way. In *Safrit v. Cone*

⁹⁵ *Id.* at 80.

⁹⁶ *Id.* at 75.

⁹⁷ *Id.* at 79.

⁹⁸ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52, 56–58 & n.19 (1974).

⁹⁹ *See, e.g., Fayer v. Town of Middlebury*, 258 F.3d 117, 123 (2d Cir. 2001); *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516 (7th Cir. 2001); *Rogers v. New York Univ.*, 220 F.3d 73, 76–77 (2d Cir. 2000); *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631–32 (6th Cir. 1999); *Quint v. A. E. Staley Mfg. Co.*, 172 F.3d 1, 9 (1st Cir. 1999).

Mills Corp.,¹⁰⁰ the collective bargaining agreement's non-discrimination provision recited that the parties agreed "to abide by all the requirements of Title VII of the Civil Rights Act of 1964."¹⁰¹ The same provision declared, "Unresolved grievances arising under this Section are the proper subjects for arbitration."¹⁰² Under the CBA, the employee could not proceed at any stage of the grievance procedure without the union.¹⁰³

After twelve years of employment with Cone Mills, Sarfit became a fixer trainee and was the only female trainee in her class. She alleged that her employer failed to train her properly and denied her job opportunities that were available to other trainees. The union grieved and at the fourth step of the grievance procedure the employer agreed to correct the deficiencies. The plaintiff alleged, however, that the employer breached the agreement and continued to discriminate against her. The union declined to file a new grievance and advised the plaintiff to seek redress outside of the CBA. Hence, plaintiff filed a charge with the EEOC and ultimately filed suit.¹⁰⁴

The district court granted summary judgment against the plaintiff, holding that the CBA waived her right to sue. The Fourth Circuit affirmed. The court reasoned, "[I]t is hard to imagine a waiver that would be more definite or absolute. The parties agreed that they would 'abide by all the requirements of Title VII' and that '[u]nresolved grievance arising under this Section are the proper subjects for arbitration.'"¹⁰⁵

The court rejected the plaintiff's argument that her good faith compliance with the grievance procedure coupled with her inability to control processing of the grievance should have relieved her of any duty to arbitrate.¹⁰⁶ Consequently, the plaintiff found herself out of court and also out of the grievance and arbitration machinery.¹⁰⁷

Other courts have found clear and unmistakable waivers and compelled arbitration of employee public law claims. Although many of these are

¹⁰⁰ *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001).

¹⁰¹ *Id.* at 307.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 308.

¹⁰⁶ *Id.*

¹⁰⁷ The harshness of the court's decision is apparent when it is compared to the approach of the National Labor Relations Board (NLRB). The NLRB often defers unfair labor practice complaints to arbitration where the incident giving rise to the alleged unfair labor practice may also give rise to a grievance. However, the NLRB conditions such deferral on the employer's agreement to waive any procedural defects that might otherwise preclude arbitration. See *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837 (1971).

within the Fourth Circuit,¹⁰⁸ the phenomenon is not limited to that arbitration-happy jurisdiction. For example, the Appellate Division of the New York Supreme Court has compelled arbitration of statutory discrimination claims where the collective bargaining agreements' grievance and arbitration provisions expressly covered claims arising under the statutes.¹⁰⁹

Courts are also compelling arbitration under CBAs in cases where the second or third *Gardner-Denver* concerns do not exist. For example, in *Ruiz v. Sysco Food Services*,¹¹⁰ Sysco fired Ruiz for allegedly threatening his supervisor with a knife. Ruiz grieved and an arbitrator found that the investigation leading to Ruiz's discharge did not comply with CBA requirements.¹¹¹ Following his reinstatement, Ruiz sued for, inter alia, defamation and intentional and negligent infliction of emotional distress, all arising out of the investigation and its aftermath. The California Court of Appeal held that Ruiz was required to arbitrate his tort claims under the CBA. The court reasoned that determining whether Ruiz could establish "actual malice," required for the defamation claim, and "conduct beyond that which a civilized society would tolerate," required for the emotional distress claims, required interpretation of the CBA.¹¹² It further opined that "[t]he CBA language is broad enough to cover the subject matter of [Ruiz's] complaint."¹¹³ Thus, an arbitrator hearing Ruiz's tort claims would have to interpret the CBA and then interpret and apply California tort law to determine whether Ruiz had a claim and what relief was appropriate.¹¹⁴

¹⁰⁸ See *Wikle v. CNA Holdings, Inc.*, 9 F. App'x 112, 113-14 (4th Cir. 2001); *Singletary v. Enersys, Inc.*, 57 F. App'x. 161, 165 (4th Cir. 2003); *Pine Ridge Coal Co. v. Loftis*, 271 F. Supp. 2d 905 (S.D.W.V. 2003); *Saunders v. Int'l Longshoremen's Ass'n*, 265 F. Supp. 2d 624, 628 (E.D. Va. 2003).

¹⁰⁹ See *Garcia v. Bellmare Prop. Mgmt.*, 745 N.Y.S.2d 13 (N.Y. App. Div. 2002); *Torres v. Four Seasons Hotel*, 715 N.Y.S.2d 28 (N.Y. App. Div. 2000).

¹¹⁰ *Ruiz v. Sysco Food Servs.*, 18 Cal. Rptr. 3d 700 (Cal. Ct. App. 2004).

¹¹¹ *Id.* at 703.

¹¹² *Id.* at 707.

¹¹³ *Id.*

¹¹⁴ The result in *Ruiz* contrasts with *Tice v. American Airlines, Inc.*, 288 F.3d 313 (7th Cir. 2002). *Tice* and fellow plaintiffs were pilots who, by Federal Aviation Administration regulation, were disqualified from captain and first officer positions upon attaining age sixty. They sought to down bid into flight officer positions and were denied. They sued alleging that American's refusal to allow them to down bid was due to their age in violation of the Age Discrimination in Employment Act. American claimed that under the CBA, no one disqualified from a captain or first officer position was allowed to down bid regardless of whether the disqualification was the result of reaching age sixty or some other nonage-related reason. The plaintiffs disputed that position. The court held that the plaintiffs' claims depended on interpretation of the CBA and required the district

Courts are also compelling arbitration of public law claims in cases where the union's control over the arbitration proceeding is not at issue. For example, in *Interstate Brands Corp. v. Teamsters Local 550*,¹¹⁵ Interstate Brands sued the union under section 303 of the Labor Management Relations Act for damages resulting from an alleged secondary boycott. The CBA's grievance procedure provided for the parties to arbitrate "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this Agreement, or any act or conduct or relation between the parties hereto, directly or indirectly."¹¹⁶

Relying on *Wright*, Interstate argued that the strong presumption of arbitrability should not apply because it was pursuing a claim under a federal statute. Interstate maintained that any waiver of its right to bring its claim in federal court had to be clear and unmistakable.¹¹⁷

The Second Circuit rejected the argument. According to the court, *Wright's* requirement of a clear and unmistakable waiver resulted from concerns with the union waiving the individual employee's right to sue. The court reasoned that the *Wright* requirement did not apply to an employer's agreement in a CBA to arbitrate its statutory claims. Accordingly, the court held that Interstate was required to arbitrate its section 303 claim against the union.¹¹⁸

In *Barnica v. Kenai Peninsula Borough School District*,¹¹⁹ an equally divided Alaska Supreme Court affirmed a trial court's decision requiring an employee to arbitrate his state statutory sex discrimination claim pursuant to the CBA's grievance and arbitration procedure. The contract contained a non-discrimination clause,¹²⁰ and a clause defining a grievance as "a claim by a grievant that there has been an alleged violation . . . of the Agreement."¹²¹ The court's dispositional opinion distinguished *Wright*, noting, *inter alia*, that grievance arbitration in public employment CBAs was

court to stay the lawsuit while plaintiffs pursued their claims under the CBA in arbitration. The court indicated, however, that if plaintiffs obtained a favorable CBA interpretation from the arbitrator, they could return to court to pursue their ADEA cause of action.

¹¹⁵ *Interstate Brands Corp. v. Teamsters Local 550*, 167 F.3d 764 (2d Cir. 1999).

¹¹⁶ *Id.* at 765.

¹¹⁷ *Id.* at 767.

¹¹⁸ *Id.* at 767-68.

¹¹⁹ *Barnica v. Kenia Peninsula Borough Sch. Dist.*, 46 P.3d 974 (Alaska 2002).

¹²⁰ *Id.* at 976 n.9.

¹²¹ *Id.* at 977 n.11.

mandated by Alaska statute,¹²² and that under Alaska state law, the union has less control over the proceeding because the employee has a right to proceed to arbitration on demand.¹²³

Thus, although most reported decisions refuse to compel arbitration of public law claims under a CBA, courts are ordering such arbitration in a significant minority of cases. Moreover, with increasing frequency, parties are arbitrating public law claims and arbitrators are looking to public law in adjudicating grievances without court compulsion. In such cases, after the arbitrator renders an award, an employee may seek to litigate the public law claim. Such action inevitably raises the question of the effect of the arbitration award on the subsequent litigation.

2. Litigating a Public Law Claim Following an Arbitration Award

In *Gardner-Denver*, the Court recognized that an arbitration award would be evidence in subsequent litigation with its weight to be determined on a case-by-case basis.¹²⁴ Consequently, the Fifth Circuit has held it to be reversible error for a court to exclude the arbitration award from evidence.¹²⁵

In a pre-*Wright* decision refusing to compel an employee to arbitrate statutory claims under a CBA, the Seventh Circuit suggested that if the claims were arbitrated, the employee would be collaterally estopped from relitigating the issues resolved in the award.¹²⁶ Most courts since *Wright* have not followed this approach. Nevertheless, where an adverse employment action has been upheld in a grievance arbitration, the evidentiary weight accorded the arbitration award often effectively precludes the employee's public law claim.

In *Collins v. New York City Transit Authority*,¹²⁷ the plaintiff was fired after he allegedly assaulted his supervisor. He grieved and a tri-partite arbitration board upheld his termination. Plaintiff sued alleging that his discharge was the result of his race and his prior EEOC complaints, in violation of Title VII. The district court granted the defendants' motion for

¹²² *Id.* at 977.

¹²³ *Id.* at 980 n.48. By 3-2 vote, the Alaska Supreme Court has backed away from *Barnica*. See *Hammond v. State*, 107 P.3d 871, 876 (Alaska 2005). However, the notion that a standard more deferential to arbitration should apply when the employee has greater control over the process than in the typical CBA has not been lost on other courts. See, e.g., *Serafin v. Connecticut*, 10 Wage & Hour Cas. 2d (BNA) 1120, 1124 (D. Conn. Mar. 9, 2005).

¹²⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974).

¹²⁵ *Graef v. Chem. Leaman Corp.*, 106 F.3d 112, 117 (5th Cir. 1997).

¹²⁶ *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir. 1997).

¹²⁷ *Collins v. New York City Transit Auth.*, 305 F.3d 113 (2d Cir. 2002).

summary judgment and the Second Circuit affirmed. The court placed particular weight on the arbitration award upholding the plaintiff's discharge. The court opined:

[A] decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link [between the adverse employment action and the allegedly illegal motive]. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the Title VII plaintiff, to survive a motion for summary judgment, must present strong evidence that the decision was wrong as a matter of fact—e.g. new evidence not before the tribunal—or that the impartiality of the proceeding was compromised.¹²⁸

In *Clarke v. UFI, Inc.*,¹²⁹ the court found that the arbitration award was not entitled to res judicata effect. Nevertheless, the court opined that where an arbitration decision finds all facts against a plaintiff, the award will essentially guarantee a grant of summary judgment against the plaintiff's Title VII sexual harassment claim. The court explained, "Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it *great weight*. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on basis of an adequate record."¹³⁰

Similarly, in *Darden v. Illinois Bell Telephone Co.*,¹³¹ the Seventh Circuit affirmed a district court's grant of summary judgment against a Title VII plaintiff which relied heavily on a grievance arbitration award that had upheld the plaintiff's discharge. The arbitrator addressed the discrimination claims in the award. The court opined:

The "great weight" standard was appropriate here since the arbitrator clearly construed the collective bargaining agreement in accord with Title VII to proscribe racially discriminatory and retaliatory discharges, and thus fully considered Darden's Title VII claim. Reviewing the arbitrator's finding that Illinois Bell had not discharged Darden for either of these illicit reasons, along with the totality of the evidence . . . the district court did not err when

¹²⁸ *Id.* at 119; *see also* *Martinez v. Amalgamated Transit Union Local 1056*, No. 03-CV-6291, 2005 U.S. Dist. LEXIS 12252 (S.D.N.Y. June 23, 2005) (applying *Collins*); *Norris v. New York City Hous. Auth.*, No. 02 Civ. 6933, 2004 U.S. Dist. LEXIS 8619 (S.D.N.Y. May 14, 2004) (same).

¹²⁹ *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320 (E.D.N.Y. 2000).

¹³⁰ *Id.* at 330 n.6 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974)) (emphasis added); *see also* *Pender v. Dist. Council 37 AFSCME*, 223 F. Supp. 2d 534 (S.D.N.Y. 2002).

¹³¹ *Darden v. Ill. Bell Tel. Co.*, 797 F.2d 497 (7th Cir. 1986).

it held that Darden had failed to create a genuine dispute as to the real reason for his discharge.¹³²

Even where an arbitrator refuses to consider the discrimination or other public law issues in resolving the grievance, the award may preclude the employee from litigating subsequently. In *Umpierre v. SUNY Brockport*,¹³³ plaintiff challenged her dismissal as a professor and one-time chair of the foreign language department at SUNY Brockport under the CBA.¹³⁴ At the arbitration hearing, plaintiff, represented by union counsel, charged the university with retaliating against her activities opposing discrimination and discriminating against her because of her gender, national origin and sexual orientation.¹³⁵ The arbitrator expressly refused to address the discrimination and retaliation claims,¹³⁶ but did find that the university proved all charges against plaintiff except one and approved its decision to terminate plaintiff's employment. The university then confirmed plaintiff's dismissal.¹³⁷

Plaintiff sued for alleged violations of Title VII and the ADA. The court relied on the arbitration award in granting the defendants' motion for summary judgment. The court considered the arbitrator's failure to address the discrimination issues immaterial and granted summary judgment because it concluded that "no rational trier of fact could conclude that SUNY Brockport fired her for any reason other than because the arbitrator found her guilty of misconduct."¹³⁸

Although the major weight of authority is against giving grievance arbitration awards res judicata or collateral estoppel effect in subsequent public law litigation, the bar against such preclusive effect is not absolute. A number of states have given grievance arbitration awards res judicata or collateral estoppel effect in subsequent common law tort actions.¹³⁹ Particular circumstances may lead to a court affording a grievance arbitration

¹³² *Id.* at 504.

¹³³ *Umpierre v. SUNY Brockport*, No. 95-CV-887, 1997 U.S. Dist. LEXIS 14753 (N.D.N.Y. Sept. 26, 1997).

¹³⁴ *Id.* at *1.

¹³⁵ *Id.* at *5.

¹³⁶ *Id.* at *14 n.4.

¹³⁷ *Id.* at *4.

¹³⁸ *Id.* at *13.

¹³⁹ See, e.g., *Kelly v. Vons Cos.*, 79 Cal. Rptr. 2d 763, 769-70 (Cal. Ct. App. 1998); *Bulger v. Lieberman*, 667 A.2d 561, 562 (Conn. App. Ct. 1995); *Taylor v. People's Gas Light & Coke Co.*, 656 N.E.2d 134, 141 (Ill. App. Ct. 1995). But see *Taylor v. Lockheed Martin Corp.*, 6 Cal. Rptr. 3d 358, 362-63 (Cal. Ct. App. 2003) (refusing to give arbitration award preclusive effect with respect to statutory claims); *Camargo v. Cal. Portland Cement Co.*, 103 Cal. Rptr. 2d 841, 855 (Cal. Ct. App. 2001) (same).

award res judicata or collateral estoppel effect in subsequent statutory litigation. For example, in *Serafin v. Connecticut*,¹⁴⁰ the plaintiff sued for violation of the FMLA. The plaintiff had previously grieved her termination pursuant to her CBA and the arbitrator upheld her discharge. Unlike the typical CBA, the agreement that covered the plaintiff allowed her to arbitrate personally without the approval or participation of the union. Plaintiff did so, was represented at the arbitration by her personal attorney and, by agreement, paid half of the arbitrator's fee.¹⁴¹ The court distinguished cases that refused to give preclusive effect to awards from union-controlled arbitration procedures and held that the arbitration award precluded plaintiff from litigating her FMLA claim in court.¹⁴²

Thus, labor arbitrators are increasingly being called upon to resolve public law claims either because courts are compelling employees to submit those claims to the CBA's arbitration procedure or because unions and employees are voluntarily doing so. In the next section, we explore the evolving law of the arbitrator's authority to interpret and apply the public law.

D. The Evolving Judicial View of Arbitral Authority

The Supreme Court's views concerning arbitral authority to interpret and apply public law have come a long way in the almost half century since the *Steelworkers Trilogy*. In the *Trilogy*, the Court suggested that arbitrators who apply the public law rather than the CBA exceed their authority.¹⁴³ The Court reiterated that view in *Gardner-Denver*.¹⁴⁴ Twenty-three years after the *Trilogy*, in *W.R. Grace & Co. v. Rubber Workers Local 759*,¹⁴⁵ the Court suggested that an arbitrator may recognize supervening illegality as a defense to a grievance.¹⁴⁶ Fifteen years thereafter, in *Wright v. Universal Maritime Service Corp.*,¹⁴⁷ the Court opined that a grievance arbitrator facing a public law claim is to apply the public law.¹⁴⁸

¹⁴⁰ *Serafin v. Connecticut*, 10 Wage & Hour Cas. 2d (BNA) 1120 (D. Conn. Mar. 9, 2005).

¹⁴¹ *Id.* at 1126.

¹⁴² *Id.* at 1128.

¹⁴³ *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

¹⁴⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974).

¹⁴⁵ *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983).

¹⁴⁶ *Id.* at 767 n.10.

¹⁴⁷ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

¹⁴⁸ *Id.* at 79.

Lower court views of arbitral authority to interpret and apply public law external to the CBA have also evolved. In *Roadmaster Corp. v. Production and Maintenance Employees' Local 504*,¹⁴⁹ a CBA between Roadmaster and United Employees Union Number One ran through February 28, 1986, and provided that it would automatically renew from year to year unless one party gave the other party at least sixty days notice of intent to amend or terminate it. During the term of the contract, the union struck over wage concessions demanded by the company, and the company hired over 500 permanent replacements. Simultaneously, the union's membership voted to merge with Local 771 of the Laborers International Union of North America (LIUNA). Officers from both unions purported to accept Roadmaster's most recent offer but the company refused to reinstate the replaced strikers. Thereafter, the employees voted to form their own LIUNA local and Local 504 was chartered. Roadmaster refused to recognize Local 504.

On December 16, 1985, Roadmaster sent a letter notifying all three unions of its intent to terminate the CBA effective February 28, 1986. Roadmaster refused to bargain with any union. Local 504 sued and a court compelled Roadmaster to arbitrate a number of issues, including whether the December 16 letter defeated the automatic renewal of the CBA. The arbitrator held that the letter was void because Roadmaster's refusal to bargain violated section 8(d)(2) of the National Labor Relations Act (NLRA). Consequently, he found that the contract automatically renewed for another year.

The Seventh Circuit held that the arbitrator exceeded his authority and refused to enforce the award. The court reasoned that the arbitrator based the award on the NLRA and that he had no authority to do so. The court opined:

The arbitrator cast no doubt upon what he was doing. And he was plainly wrong. He based his decision not on the parties' bargain, but rather upon his view of the requirements of enacted legislation. Thus, he has exceeded the scope of the submission and the award will not be enforced.¹⁵⁰

It is not clear whether the court's restrictive view of the arbitrator's authority in *Roadmaster* survives the Supreme Court's charge in *Wright* that arbitrators presented with statutory claims are to apply the public law. Regardless, the Seventh Circuit has more recently taken a more expansive view of arbitral authority to apply public law without even mentioning *Roadmaster*.

¹⁴⁹ *Roadmaster Corp. v. Prod. & Maint. Employees' Local 504*, 851 F.2d 886 (7th Cir. 1988).

¹⁵⁰ *Id.* at 889 (quotation marks and citations omitted).

In *Butler Manufacturing Co. v. United Steelworkers of America*,¹⁵¹ the employer discharged an employee pursuant to a negotiated attendance control plan embodied in a memorandum of understanding between the employer and the union. The arbitrator determined that three of the absences for which the grievant had been charged were FMLA-protected and ordered the grievant reinstated with half back pay.¹⁵² The employer sued to vacate the award.

The union argued that the award drew its essence from the contract and cited a provision of the agreement that stated, "Butler Manufacturing Company offers equal opportunity for employment, advancement in employment, and continuation of employment to all qualified individuals in accordance with the provisions of law and in accordance with the provisions of this Agreement for the represented employees covered by it."¹⁵³ The district court, however, determined the quoted language to be "nothing but boilerplate anti-discrimination commitments that did not necessarily pull the FMLA into the agreement,"¹⁵⁴ and held that the arbitrator exceeded her authority by relying on the FMLA. The Seventh Circuit reversed. The court reasoned:

If there were some kind of "clear statement" rule that applied to CBAs, and to the match between a CBA and an arbitrator's authority, perhaps [the district court's analysis] would have been right. But there is no such rule. Instead . . . the standard asks only whether the arbitrator's interpretation can rationally be linked to the CBA. Here, a broader look . . . demonstrates that the arbitrator's award did draw its essence from the parties' agreement. Article 2 paragraph 13 . . . does not say only that there will be "equal opportunity for employment . . . in accordance with the provisions of this Agreement . . ." In the ellipsis between the word "employment" and the last phrase comes the phrase "in accordance with the provisions of law." We have no reason to think that this reference to external law is either surplusage or "mere boilerplate." . . . We find that Article 2, paragraph 13 conferred on the arbitrator the authority to consider the FMLA.¹⁵⁵

The First Circuit has taken an even more expansive view of arbitral authority. In *Coastal Oil of New England, Inc. v. Teamsters Local 25*,¹⁵⁶ the

¹⁵¹ *Butler Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629 (7th Cir. 2003).

¹⁵² *Id.* at 632.

¹⁵³ *Id.* at 633.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 633–34 (citation omitted).

¹⁵⁶ *Coastal Oil of New England, Inc. v. Teamsters Local 25*, 134 F.3d 466 (1st Cir. 1998).

CBA provided, *inter alia*, that the employer would either maintain workers' compensation insurance or provide injured employees with the same benefits as provided for in the Massachusetts worker's compensation statute.¹⁵⁷ The CBA covered only one of the employer's three facilities. The same union represented the employees at the other two facilities, but each facility had its own CBA.

An employee covered by the CBA was injured on the job. Following his recovery, he sought reinstatement but was advised that there were no openings. The union and employer agreed that the employee would be reinstated to the next available opening. Subsequently, the employee learned of an opening at one of the other two facilities. When the employer refused to award him that position, he grieved and the union took the claim to arbitration.

The arbitrator, relying on the Massachusetts Worker's Compensation Law, ordered the employer to reinstate the grievant to the position at the other facility which was covered by a different CBA. The First Circuit upheld the arbitrator's authority to do so. Relying on *Gilmer* and its progeny, the court gave the employer's attack on the arbitrator's authority short shrift:

How can the arbitrator, in determining whether appellant lived up to the contractual obligations mandated by . . . the Revere agreement, fail to address whether the provisions of the Massachusetts Worker's Compensation Law incorporated into that agreement . . . have been met?

The response to this question as well as to appellant's challenge to the arbitrator's authority to interpret the aforementioned Massachusetts statute is self-evident. Obviously, the arbitrator acted properly and within the scope of his delegated authority. We can perceive of no valid reason why the parties could not also agree to have statutory rights enforced before an arbitral forum.¹⁵⁸

Thus, as grievance arbitrators are called upon with increasing frequency to adjudicate employees' public law claims, courts are taking an increasingly expansive view of their authority to do so. We explore the implications of these developments in the next part.

V. THE ARBITRATOR'S EVOLVING ROLE—MOVING TOWARD GREATER INDEPENDENCE OF THE PARTIES?

We began this article by using a hypothetical involving the FMLA to

¹⁵⁷ *Id.* at 468.

¹⁵⁸ *Id.* at 469–70.

introduce the topic. Our choice of the FMLA was deliberate. The FMLA is having a greater impact on labor arbitration than any other statute or source of external law.

The FMLA covers employers who employ fifty or more employees on each regular working day for twenty or more weeks during the current or preceding calendar year.¹⁵⁹ The Act applies to employees who have worked for their employers for at least twelve months, have worked at least 1250 hours in the preceding twelve months, and are employed at a site where the employer employs at least fifty employees within a seventy-five mile radius.¹⁶⁰ Covered employees are entitled to twelve weeks of unpaid leave in any twelve month period for the birth or adoption of a child, for the employee's serious health condition, or to care for a spouse, parent or minor or disabled child who has a serious health condition.¹⁶¹

The primary impetus for enactment of the FMLA was the need to enable employees to take time off from work following the birth or adoption of a child without worrying about job security or health insurance. In practice, however, leave following birth or adoption of a child accounts for a small minority of FMLA leaves that are taken. The Department of Labor's 2000 surveys, the most recent data available, reflect the following:¹⁶²

Reasons for Taking Leave Across All Leaves
Taken in Previous 18 Months: 2000 Survey

<u>Reason For Leave</u>	<u>Percent of Leave-Takers</u>
Own Health	52.4%
Maternity-Disability	7.9%
Care for New Born, Newly Adopted, or Newly Placed Foster Child	18.5%
Care for ill child	11.5%
Care for ill spouse	6.4%
Care for ill parent	13.0%

¹⁵⁹ 29 U.S.C. § 2611(4) (2000). Employees are counted as long as they are on the payroll on a given workday. They need not be physically working that day. Consequently, part-time employees are counted the same as full-time employees. See *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202 (1997).

¹⁶⁰ 29 U.S.C. § 2611(2)(A)–(B) (2000).

¹⁶¹ *Id.* § 2612(a)(1).

¹⁶² DAVID CANTOR ET AL., *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE* § 2.1.2 tbl.2.3 (2001), available at <http://webharvest.gov/peth04/20041118135126/www.dol.gov/asp/fmla/chapter2.htm>.

Thus, the majority of leave-takers took leave for their own health conditions. Fewer than 20 percent took leave to care for a newborn, newly adopted or newly placed foster child. (The table also shows 7.9 percent took leave for maternity-disability. The table totals exceed 100 percent because of overlap and, presumably, the maternity-disability leave takers overlap with leave takers to care for a newborn child.)

Not surprisingly, most litigation has concerned leaves taken or sought for serious health conditions. This is because most leaves are taken or sought for serious health conditions. It also is because determining whether an employee qualifies for leave for a serious health condition is more complex than determining whether an employee qualifies for leave following the birth or adoption of a child. In the latter case one simply determines whether the employee has worked the requisite period of time and works in a covered facility and whether the employee has had or adopted a child within the past twelve months. On the other hand, the term "serious health condition" is ambiguous. It clearly covers open heart-surgery and clearly does not cover a skinned knee. However, whether it covers illnesses whose severity is between skinned knees and open-heart surgery is open to debate. For example, under some circumstances an ear infection or the flu may be a serious health condition,¹⁶³ while under other circumstances they will not be.¹⁶⁴ One court has held that a case of eczema was not a serious health condition,¹⁶⁵ while another held that an ulcer was.¹⁶⁶ It is not surprising that a survey of appellate court FMLA decisions issued between December 1994 and October 1999 found that 25 percent concerned the seriousness of the employee's illness and 6 percent concerned the seriousness of the illness of the employee's family member.¹⁶⁷

The FMLA also gives greater rights to employees taking serious health condition leave than to those taking childbirth or adoption leave. For example, whereas employees may take leave intermittently or on a reduced schedule following childbirth or adoption only with the consent of their employers, they have a right to intermittent or reduced leave for their or a

¹⁶³ See *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001) (flu); *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671 (8th Cir. 2000) (ear infection).

¹⁶⁴ See *Henderson v. Cent. Progressive Bank*, 83 Emp. Prac. Dec. (CCH) ¶ 41,215 (E.D. La. 2002) (flu); *Seidle v. Providant Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994) (ear infection).

¹⁶⁵ *Beal v. Rubbermaid Commercial Prods., Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997).

¹⁶⁶ *Victorelli v. Shadyside Hosp.*, 128 F.3d 184 (3d Cir. 1997).

¹⁶⁷ STEVEN K. WISENSALE, *FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA* 172 tbl.7.6 (2001).

family member's serious health condition whenever medically necessary.¹⁶⁸

Absenteeism presents one of the most frequent discipline problems encountered by employers.¹⁶⁹ Employers frequently respond with attendance control plans that assess occurrence points for absence, tardiness, early departure, and failure to notify of an absence or anticipated late arrival. Discipline is imposed at increasingly severe levels upon accumulation of specified point totals. However, Department of Labor regulations expressly provide: "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions . . . nor can FMLA leave be counted under 'no fault' attendance policies."¹⁷⁰

Discipline and discharge for attendance infractions constitute a significant portion of labor arbitrators' dockets.¹⁷¹ In hearing these cases, arbitrators inevitably run headlong into the FMLA.

Recall Mittenenthal and Bloch's suggestion that arbitrators consider "implications"—the existing conditions surrounding the collective bargaining agreement—in order to preserve the parties' bargain.¹⁷² In attendance discipline and discharge cases these implications include the simple fact that an employer cannot operate its attendance plan anymore without significantly taking into account the FMLA, and, therefore, it does not make sense to operate the disciplinary system as if this elephant were not standing in the middle of the room. Regardless of whether one agrees with Howlett's general contention that the law is incorporated into every contract, the FMLA is clearly implicated—and with increasing frequency expressly incorporated—into every contract's just cause provision. Consequently, the most recent edition of the leading treatise on labor arbitration observes, "In the majority of cases involving the FMLA, arbitrators rely on the provisions of the FMLA and the Department of Labor regulations without regard to whether the collective bargaining agreement says anything about the FMLA."¹⁷³

When arbitrators adjudicate a grievant's FMLA rights, do they remain solely the parties' designated contract reader and therefore governed by the parties' expectations in the manner that arbitrators and scholars from Dean Shulman forward have ascribed? Or are they beginning to assume a more

¹⁶⁸ 29 U.S.C. § 2612(b) (2000).

¹⁶⁹ See Barbara Zausner Tener & Ann Gosline, *Absenteeism and Tardiness*, in LABOR AND EMPLOYMENT ARBITRATION § 17.01[1] (Tim Bornstein et al. eds., 2d ed. 2005).

¹⁷⁰ 29 C.F.R. § 825.220(c) (2005).

¹⁷¹ See Tener & Gosline, *supra* note 169, at § 17.01[1].

¹⁷² See *supra* notes 56–60 and accompanying text.

¹⁷³ ELKOURI & ELKOURI, *supra* note 1, at 520.

public role, a role somewhat independent of the parties? One arbitrator has expressly disclaimed the independent role. After finding that the outcome of a discharge grievance turned on whether the grievant's tardiness was FMLA-protected, he wrote, "[E]ven if the arbitrator misconstrues the law, the parties have bargained for his interpretation of the statute when the law was incorporated by reference in the collective bargaining agreement. In a sense, the arbitrator is not defining the law. He is interpreting the contract."¹⁷⁴

In *Wright*, the Supreme Court indicated that when adjudicating a grievant's statutory claim, an arbitrator is to apply the public law rather than the contract.¹⁷⁵ However, in *Wright* the Court may have viewed the claim as solely a statutory claim, and not a mixed contractual/statutory claim. The Court described the dispute as one that "ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute."¹⁷⁶ Regardless of whether one agrees with the Court's assessment of that claim, that was the factual basis upon which the Court concluded that the question for the arbitrator in such a case is what federal law requires, and not what the parties agreed to.

In most grievances in which the FMLA is raised in arbitration, the issue will be a mixed one. The issue submitted to the arbitrator by the parties is still likely to be whether there was just cause to discipline or discharge the grievant, and the FMLA claim will be raised as part of that issue. In such a case, is the arbitrator still acting within a solely private context? When the FMLA is raised in a discipline case, there is more pressure for arbitrators to "get the law right," i.e. to pay attention to legal precedent and regulations, than there has been in the past. Recall Arbitrator Bloch's suggestion in his 2000 speech on just cause that the arbitrator can simply pay attention to the overall purpose of a law when deciding just cause issues, rather than being bound by their specifics in every detail.¹⁷⁷ The FMLA prohibits employer interference, restraint, or denial of leave rights, and the Department of Labor regulations make clear that disciplining an employee for taking FMLA-protected leave violates this provision. The question of whether a disciplinary action that is the subject of the grievance unlawfully interfered with FMLA rights is inextricably tied to what exactly is protected leave. That question, in turn, will almost undoubtedly depend upon legal precedent. Thus, the nature of the FMLA and its interaction with the contractual just cause provision binds the arbitrator to the specific details of the law.

¹⁷⁴ Chicago Tribune Co., 119 Lab. Arb. Rep. (BNA) 1007, 1013 n.15 (2003) (Nathan, Arb.).

¹⁷⁵ *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79 (1998).

¹⁷⁶ *Id.* at 78-79.

¹⁷⁷ See *supra* notes 61-64 and accompanying text.

The obligation to get the law right is not new to arbitrators. Arbitrators adjudicating grievances within the federal sector have an independent obligation to get the law right, an obligation enforced by the FLRA. In attendance grievances in all sectors, advocates increasingly are introducing in arbitration the extensive and complex federal regulations governing the FMLA. When they do so, arbitrators may be more likely to treat such regulations as controlling, as an arbitrator would in the federal sector, and not simply as sources that may persuade but do not bind.

The question remains as to what the arbitrator should do if the parties do not raise sections of the FMLA law, the regulations or legal precedent that the arbitrator believes may be implicated. The need for the arbitrator to get the law right may be stronger with regard to the FMLA than with regard to any other external law that arbitrators have addressed in the past. This need is particularly strong when we realize that, either as a matter of law or as a practical matter, the arbitrator's award likely will preclude litigation of the grievant's statutory claim.¹⁷⁸ This need imposes on arbitrators an obligation to know as much about the law as they can. This obligation may in part be independent of the parties and extends to conducting necessary legal research beyond materials cited or supplied by the parties. The arbitrator raising the issues on her own or conducting independent research, however, may bring herself into conflict with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes which provides, "The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing."¹⁷⁹ However, meeting the implied expectations of the parties, or perhaps the mandates of certain courts, may require arbitrators to contravene this Code section with regard to the FMLA. To the extent that this Code provision is inconsistent with the arbitral obligation to

¹⁷⁸ See *supra* notes 126-142 and accompanying text. Even before *Gilmer* and *Wright*, an unsuccessful grievant stood a very small chance of succeeding in subsequent statutory litigation. A survey in the early 1980s found that of 1,761 arbitration awards involving issues related to Title VII of the 1964 Civil Rights Act, grievants litigated their Title VII claims in court in 307 cases, but obtained a result different from the arbitration award in only 21 cases. Thus, a grievant who lost a discrimination claim in arbitration had only a slightly better than one in 100 chance of prevailing in litigation. Lamont Stallworth & Michele Hoyman, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, ARB. J., Sept. 1984, at 49, 55.

¹⁷⁹ CODE OF PROF'L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 2(G)(1)(a) (1975) (amended 2003), available at <http://www.naarb.org/code.html>. The Code is the joint effort of, and has been adopted by, the American Arbitration Association, the Federal Mediation and Conciliation Service, and the National Academy of Arbitrators.

get the law right, it may require amendment.

But what of the problem of ungrieved prior discipline used to introduce this article? An employee discharged under an employer's attendance control plan was previously suspended for absences that were FMLA-protected. However, the employee did not grieve the prior suspension. The time for filing a grievance as set forth in the CBA has long since past, but the two year limitations period for filing an FMLA claim has not elapsed. Should the arbitrator follow the well-established arbitral practice that prior discipline that was not grieved is not subject to attack, or should the arbitrator allow the union and grievant to assert that the prior discipline violated the FMLA?

Five years ago an arbitrator might have concluded that the employer expected the arbitrator to follow the well-established arbitral practice and refuse to consider the attack on the prior suspension. The union might have argued that the arbitrator should consider the FMLA violation, but the union's expectations also probably included the possibility that the arbitrator would refuse to hear the attack on the suspension. To the extent that there was a mutual expectation of the parties, it would probably have led the arbitrator to refuse to hear the FMLA attack on the prior suspension.¹⁸⁰

The parties' expectations, however, are evolving. Parties cannot ignore the overwhelming influence of the FMLA on the administration of attendance policies, and they also cannot ignore the law's influence on administration of the CBA. *Wright* suggests that the prior ungrieved discipline is subject to attack if it rests on absences that were FMLA-protected. *Wright* holds that waiver of a statutory entitlement in the collective bargaining process, of which the grievance process is a part, should be found only when it is clear and unmistakable.¹⁸¹ Failure to grieve the suspension certainly waived the claim that the suspension lacked just cause under the CBA. However, failure to grieve the suspension cannot be said to provide a clear and unmistakable waiver of the grievant's FMLA rights, as long as the statute of limitations on the FMLA claim has yet to run. Indeed, courts have struck down contractual provisions that purported to reduce the time for filing a statutory claim below the statutory limitations period.¹⁸² Thus, the arbitrator should hear the claim that the prior suspension violated the FMLA and that, to the extent the discharge rested on the prior illegal suspension, it cannot be for just cause. However, the arbitrator should refuse to hear any

¹⁸⁰ This would have been the "safe" course for the arbitrator to follow to preserve future acceptability to the parties.

¹⁸¹ *Wright*, 525 U.S. at 82.

¹⁸² For discussion of this issue see Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 615–17 (2001).

claim that the prior suspension violated the contract independent of the FMLA. For example, the arbitrator should continue to refuse to consider a claim that an earlier discipline for tardiness resulted from a defective time clock.

In considering the FMLA attack on the prior suspension, the arbitrator is heeding the "implications" discussed by Mittenthal and Bloch, in the context of the FMLA. Such incremental movements in the arbitrator's approach to statutory issues reflect the evolving process that characterizes the arbitrator's role. They also reflect an evolving analysis of what the parties' expectations are.

Of course, the external law, i.e. the FMLA, is only one element for the arbitrator to consider in determining whether there was just cause for discipline or discharge. However, in cases where the discipline or discharge rests on a foundation violative of the FMLA, it will usually be the determinative element because the parties now accept that disciplinary action that violates the FMLA cannot be for just cause.

With arbitrators delving deeper and more frequently into the law because of the FMLA, will judicial deference traditionally awarded to arbitration erode, as David Feller suggested in his lamenting the end of the Golden Age of arbitration?¹⁸³ If the primary issue is still just cause, then perhaps the long-standing view of arbitration as essentially a private process prevails, even though the arbitrator may be forging ever deeper into the interpretation of public law. One of this article's authors has called for *de novo* judicial review of arbitral interpretations of public law and argued that such review will not undermine the finality of arbitration awards.¹⁸⁴ Courts, however, have not gone down this path and are unlikely to do so.¹⁸⁵ The generally lenient standards of judicial review may place even greater pressure on arbitrators to get the law right, as no higher authority is likely to correct their mistakes.

Feller certainly was correct that the CBA is no longer the sole or clearly dominant source of the law governing the workplace. Thus, to the extent that the public law that regulates the workplace is interwoven with the CBA and to the extent that arbitrators are expected to interpret and apply the public law correctly, the labor arbitration process moves away from its traditional characterization as a purely private process and becomes quasi-public. The arbitrator's role thus evolves into a quasi-public one where statutory claims

¹⁸³ See *supra* notes 31–38 and accompanying text.

¹⁸⁴ Malin & Ladenson, *supra* note 30, at 1226–38.

¹⁸⁵ For an excellent discussion of judicial review of arbitral errors of law, see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J (forthcoming 2005).

are at issue. However, as discussed above, the parties' expectations are also evolving to encompass this quasi-public role of the labor arbitrator.

V. CONCLUSION

The title of this symposium is, "A Collision of Two Ideals: Legal Ethics and the World of ADR." With respect to labor arbitration the symposium title conjures up images of Judge Paul Hayes' largely discredited critique of the arbitral ethic of party control.¹⁸⁶ Hayes caricatured the notion of the "arbitrator as a creature of the parties," as "a marionette operated by them, a ventriloquist's dummy."¹⁸⁷ He continued, "This attitude . . . is that the arbitrator is the obedient servant of those who hire him and owes nothing whatever to the public interest or to the ends of justice. Worse than that, the attitude reflects faithlessness toward those whose interest he is pretending to protect."¹⁸⁸

Hayes' critique has been discredited by the test of time. In traditional grievance arbitration, the arbitrator as a creature of the parties has served the public interest by playing a crucial role in the parties' system of workplace self-government.

In the twenty-first century workplace, in which public regulation plays such a prominent role, the Hayes' critique may be raised in a new form as a potential collision between the arbitrator's traditional role as a creature of the parties and the arbitrator's ethical responsibility to adjudicate grievants' statutory claims in accordance with public law. Certainly the potential for such a collision has been present for some time but, as discussed in this article, we believe that the collision is turning out to be at most a near miss. As the arbitrator's role is evolving so too are the expectations of the parties. This evolution is most evident in grievances that raise issues under the FMLA. The FMLA may be changing the parties' expectations towards a general expectation that arbitrators will apply the public law and get it right when issues of public law are adjudicated through the grievance process.

¹⁸⁶ PAUL R. HAYES, LABOR ARBITRATION: A DISSENTING VIEW 59-66 (1966).

¹⁸⁷ *Id.* at 65.

¹⁸⁸ *Id.*

